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Clerk.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

## No. 512.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY, AND THE EQUITABLE TRUST COMPANY OF NEW YORK, PETITIONERS AND COMPLAINANTS,

*versus*

NORTHERN SECURITIES COMPANY, IMPLEADED WITH NORTHERN PACIFIC RAILWAY COMPANY.

ON WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

## MOTION FOR IMMEDIATE ISSUANCE OF MANDATE.

The defendant, The Northern Securities Company, respectfully suggests that, notwithstanding the decision and decree of the United States circuit court of appeals for the third judicial circuit, reversing the interlocutory decree of the circuit court of the United States for the district of New Jersey, granting the special injunction in said suit, and

notwithstanding the decision and order of this court affirming the said decree of the said circuit court of appeals, the writ of injunction, a copy whereof, together with a copy of return of service, appears in the Transcript of Record, on pp. 349–350, will, as this defendant is advised by counsel, remain in force until the same has been finally vacated by the issuance and filing of the proper mandates of this court and of the said circuit court of appeals, so that, until the issuance and filing of such mandates, the distribution by this defendant among its stockholders of the stocks of the Northern Pacific and Great Northern Railway Companies held by it will be impossible.

Wherefore this defendant prays that the immediate issuance of the mandate of this court in said suit be directed, and for such other order in the premises as the court may deem just.

JOHN G. JOHNSON,
ELIHU ROOT,
FRANCIS LYNDE STETSON,
JOHN W. GRIGGS,
W. P. CLOUGH,
*Of Counsel for Defendant, Northern Securities Company.*

MARCH 16, 1905.

[Endorsed:] Supreme Court United States, Oct. term, 1904. No. 512. Edward H. Harriman and others *vs.* Northern Securities Company. On writ of certiorari to the circuit court of appeals for third circuit. Motion for immediate issuance of mandate. John G. Johnson, Elihu Root, Francis Lynde Stetson, John W. Griggs, W. P. Clough, counsel for Northern Securities Company.

Supreme Court U. S.
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FEB 21 1905
JAMES H. MCKENNEY,
Clerk.

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 512.

E. H. HARRIMAN ET AL.

vs.

Northern Securities Co.

## PETITION TO FILE INTERVENING BRIEF ON BEHALF OF THE CONTINENTAL SECURITIES COMPANY.

JAS. HAMILTON LEWIS,
*Solicitor for Petitioner, Continental Securities Co.*

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C. 1903

# SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

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## No. .....

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E. H. HARRIMAN ET AL.

*vs.*

JAMES J. HILL ET AL.

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PETITION TO FILE INTERVENING BRIEF ON BEHALF OF CONTINENTAL SECURITIES COMPANY.

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*To the Honorable Supreme Court of the United States:*

Your petitioner, The Continental Securities Company, by James Hamilton Lewis, its solicitor, respectfully shows and presents to the court:

I.

That it is a corporation organized and existing under the laws of the State of Massachusetts and a stockholder of the Northern Securities Company to an amount in excess of $50,000 and as spokesman for an amount in excess of $500,000; that in this petition it speaks for itself and all other stockholders holding stock of the said Northern Securities Company to any and all extent wherein the same may be situated or affected as your petitioner.

II.

Your petitioner represents that in the controversy before the court it is sought to obtain a ruling, and the issues are so limited as to only obtain a ruling, as will affect and control the private interests of the persons to the litigation at

bar; that the interests of the several stockholders of the Northern Securities Company will necessarily be passed upon by the court in the hearing, consideration, and decision of the cause now before the court, but, as your petitioner avers, without any contentions or rights of the said individual stockholders being duly or fully presented to the court.

III.

Your petitioner avers and presents to the court that there are many questions of law necessarily included and comprehended in the case at bar which, if determined, would settle the rights, limitations, and liabilities, as well as establish the privileges and benefits, of the individual stockholders of the Northern Securities Company; that if the said rights of the said individual stockholders and the contentions necessary to the justice of their position be omitted in the hearing now before the court, rulings of the court may be made touching the question which inadvertently would wrongfully limit the rights of the stockholders to the legal quantity of property or value which in law and equity would otherwise be ordered and decreed to them by the court upon a hearing of such necessarily legal questions and legal contentions as enter in the said cause now at bar in the consideration of the rights of the stockholders as compared to the situation before the court and as related to the Northern Securities Company and to the complainant and respondent in their official and representative capacity as officers and trustees of the said Northern Securities Company.

Wherefore petitioner prays the right to file a brief in behalf of itself and such other stockholders as may be similarly situated and affected, insisting upon and concerning the rights of the stockholders of the Northern Securities Company, so far as may be pertinent in the consideration of the case at bar.

Respectfully submitted.

JAS. HAMILTON LEWIS,
*Solicitor for Petitioner, Continental Securities Co.*

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Office Supreme Court U. S.
FILED
FEB 28 1905
JAMES H. McKENNEY,
Clerk.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,
*Appellees,*

vs.

NORTHERN SECURITIES COMPANY Impleaded with NORTHERN PACIFIC RAILWAY COMPANY,
*Appellant.*

512.

PROCEEDINGS UPON CERTIORARI.

## BRIEF ON BEHALF OF INTERVENOR, CONTINENTAL SECURITIES COMPANY.

JAS. HAMILTON LEWIS,
Solicitor for Continental Securities Company.

THE GUNTHORP-WARREN PRINTING CO., 118 RANDOLPH STREET, CHICAGO.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1904.

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| **EDWARD H. HARRIMAN, WINSLOW S. PIERCE, OREGON SHORT LINE RAILROAD COMPANY and THE EQUITABLE TRUST COMPANY OF NEW YORK,** *Appellees,* vs. **NORTHERN SECURITIES COMPANY Impleaded with NORTHERN PACIFIC RAILWAY COMPANY,** *Appellant.* | PROCEEDINGS UPON CERTIORARI. |

## BRIEF ON BEHALF OF INTERVENOR, CONTINENTAL SECURITY COMPANY.

TO THE HONORABLE SUPREME COURT:

Your petitioner, by consent, intervening for the purpose of making suggestion concerning the rights of the stockholders of the Northern Securities Company, present as suggestions of law pertinent to the consideration of the main cause at bar the following:

(1) The Continental Securities Company of New Jersey (improperly stated in the record as from Massachusetts) is at present waging a cause of action in the courts of New Jersey against defendant, North-

ern Securities Company, to establish certain rights as stockholders which would be seriously affected by the ruling in the above named cause should the said ruling touch the rights of the stockholders without a hearing of the rights of such stockholder from the standpoint of the stockholders' contention. Your petitioner therefore suggests the following considerations of law:

(a) The main suit at bar has for its purpose the settlement of what proportion of the properties of the Northern Securities shall be accorded to the contestants. The contestants claiming to be stockholders. The appellant Harriman *et al.* insisting upon certain special stocks of the Union and Southern Pacific and O. R. & N. Railway, the respondent insisting on a *pro rata* division of general stocks instead of specific ones. In the main litigation nothing is being urged looking to the protection or the assertion of the rights of the stockholders of the Northern Securities Company, that is, the holder of the stock of the Northern Securities Company, where said stock is neither that of the Great Northern Railroad, Northern Pacific, or of the Southern or Union Pacific lines.

(b) Your petitioner as stockholder therefore asserts:

(1) That when the Northern Securities Company was held to be illegal as an institution to the extent of attempting to hold and control the stock of the Great Northern and Northern Pacific Railroads, together with that of the Union Pacific and its branches, the said Northern Securities was therefore decreed to be without legal power to hold the said stocks. Therefore could not legally hold the said stocks, nor be legally possessed of them for any purpose whatsoever.

(2) When the conduct was *ultra vires;* when the conduct was itself illegal and the institution, in so far as attempting to conduct these particular properties or hold the same, violated a public statute,—the law of public policy,—and acted contrary to good morals and in direct violation of the laws of the government, then such institution was in the position of a criminal. The properties in its apparent possesson was in no wise in its legal possesson for any purpose or object.

See decision *Northern Securities* case, 193 U. S., 197.

Particularly is this true where the manner of holding was contrary to the statutes of the United States. Such holding was a void one in all respects.

*Central Trust Co.* v. *Indiana & Lake Mich. R. R. Co.*, 39 C. C. A., 220, 98 Fed., 666.

*Central Transp. Co.* v. *Pullman Car Co.*, 139 U. S., 224.

(3) No court can authorize by any form of decree the Northern Securities Company to exercise any distribution, or power, or control, or allotment of either of the stocks of the Great Northern, Northern Pacific, or Southern or Union Pacific. To do such would be to recognize some legal dominion by the Northern Securities Company of a thing which in law it could neither legally or morally hold for any purpose. Therefore, when these companies desire to obtain through their proper agencies their specific stocks, they do not take them from the Northern Securities, they take them from the place where they are—they take their own, and not a thing that any time was the

special or general property of a person which could not hold any special or general property in the particular stocks.

*Pullman Car Co.* v. *Central Transportation Co.*, 171 U. S., 138.

*McMullen* v. *Hoffman*, 174 U. S., 639.

Particularly, therefore, no claim can be made by any person to these stocks upon the theory that they are the property of the Northern Securities Company, either as a dissolved corporation or as an existing institution.

*East St. Louis Connecting Railway Company* v. *Jarvis*, 34 C. C. A., 639, 92 Fed., 735.

*Cox* v. *Terre Haute & I. R. Co.* (C. C. A.), 133 Fed. (No. 5, p. 374).

ILLEGAL CONTRACTS—UNLAWFUL PROPERTY.

"The subject of the effect of illegal contracts of corporations, either *ultra vires* in the proper sense or contrary to the statute or public policy, has been frequently considered by the Supreme Court of the United States. The settled rule in that court is that such a contract is wholly void and of no effect for any purposes. That the objection is not merely that the corporation ought not to have made it, but that it could not make it. That the contract cannot be ratified or confirmed by the stockholders, because it could not have been authorized by them, and that no performance can give the unlawful contract any validity by way of estoppel or otherwise, nor be the foundation of any right. Such have been the unvarying rulings of the court from 1879 to the present time."

*Thomas* v. *Railroad Co.*, 101 U. S., 71, 86.

*Penn. Co.* v. *St. Louis, Alton, etc., Railroad Co.*, 118 U. S., 290, 310.

*Oregon Railway Co.* v. *Oregonian Ry. Co.*, 130 U. S., 138.

*Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S., 24, 60.

*McCormick* v. *Market Bank*, 165 U. S., 538, 550.

*California Bank* v. *Kennedy*, 167 U. S., 362, 368.

*Pullman Co.* v. *Transportation Co.*, 171 U. S., 138.

"It is also the settled doctrine of the Supreme Court that any contract made in violation of a statute is void (*Gibbs* v. *Baltimore Gas. Co.*, 130 U. S., 396, 410; *Miller* v. *Ammon*, 145 U. S., 421, 426), and that 'it is vain to contend that any right can be acquired under such a contract.' (*Montgomery* v. *United States*, 15 Wall., 395, 399.) To same effect see *Desmare* v. *United States*, 93 U. S., 605, 612; *Sprott* v. *United States*, 20 Wall., 459, 461; *United States* v. *Lapene*, 17 Wall., 601, 602, 603; *United States* v. *Grossmayer*, 9 Wall., 72, 76; *The Ouchita Cotton*, 6 Wall., 521, 532."

Speaking of a contract merely *ultra vires* but not in direct violation of a statute, Mr. Justice Miller, in the Pennsylvania Co. case, supra, used the following language (118 U. S., 317):

"But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it."

"And this language has been repeatedly cited with approval, *e. g.*, in *Central Transportation Co.* v. *Pullman's Car Co.*, 139 U. S., 24, at p. 61. See also *Jacksonville, etc., Railway* v. *Hooper*, 160 U. S., 514, at p. 524. In the Central Transportation Co.'s case the court said (139 U. S., 59, 60):

"'A contract of a corporation, which is *ultra vires*

in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void, and of no legal effect. The objection to the contract is, not merely that the corporation ought not to have made it, but that it could not make it. The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.'

"This general rule has been applied or recognized in analogous cases arising out of illegal contracts and particularly in cases affecting illegal combinations or trusts. Thus, in *Langdon* v. *Branch*, 37 Fed. Rep., 449, 463, District Judge Speer, discussing the attempt of a railroad corporation to acquire stock in another company in violation of a state constitution, said:

"Contracts in violation of this clause are not permitted. When attempted they are utterly void. They have no binding force. They are nullities, and are to be disregarded and ignored whenever it concerns a party at interest to do so. *Such a contract would be absolutely void, and, being void, and an absolute nullity, no title would pass under it.*"

These positions are most amply and ably sustained by the briefs in this cause and the general law upon this subject often recognized and asserted by this court. I beg to acknowledge indebtedness to the briefs of able counsel for complainants on foregoing propositions.

## Stockholders' Rights in Distribution.

THE ONLY PROPERTY WHICH LEGALLY CAN BE RESORTED TO OR CAN BE APPORTIONED IN BEHALF OF THE STOCKHOLDERS OF THE NORTHERN SECURITIES COMPANY IS $7,500,000 OF STOCK—CASH OR PROPERTY RETURNS FROM THE LEGALLY HELD STOCK.

Now, therefore, since the stocks of these several railroad companies heretofore referred to cannot be in any respect property of the Northern Securities Company, nor can stock issued upon the basis of these different railroad stocks be regarded as stock of the Northern Securities Company; to the contrary, as a stockholer, and in behalf of all stockholders similarly situated, we most respectfully contend:—

That as the Northern Securities Company has $7,500,000 of stock issued from its said company irrespective and apart from any estate derived from the stocks of the said railroads heretofore mentioned, this $7,500,000 of stock of the Northern Securities Company is the only legal stock of that company. All other stock based upon the alleged estate of the stocks of the railroads heretofore mentioned is at once an illegal stock, represented by no legal property, and the stocks of those railroads can in no wise be treated as property of the Northern Securities Company for the purpose of liquidation to the holders of the stock of the Northern Securities Company.

The stockholders of the Northern Securities Company, therefore, should have their apportionment in proportion to the stock they hold from out of and only of the $7,500,000 legitimately issued by the Company,

as that is the only amount outstanding and issued in excess and to the exclusion of that issued upon the illegal, false and void basis of property, to-wit: stock in the railroads heretofore designated and named.

See paragraph 6 of the bill of complainant, and answer of respondent conceding the same, as appears in the record.

The outstanding capital stock of the Northern Securities is $395,400,000, divided into 3,954,000 shares of one hundred dollars each.

In the plan of distribution suggested in paragraph 14 of the complaint of the complainant, it is proposed to reduce the stock to $3,954,000, or 39,540 shares of a hundred dollars each. This is but one per cent of the outstanding capital. The ninety-nine per cent so retired would consist of and include 3,914,460 shares of an aggregate par value of $391,446,000.

Therefore, it is apparent for each share of one hundred dollars par value of Northern Securities surrendered for retirement, this plan of distribution proposes to give $39.27 of Northern Pacific stock and $30.17 of Great Northern stock.

It will be recalled that the Northern Securities issued $176,822,900 of stock in exchange for approximately $153,759,400 of the stock of the Northern Pacific Railroad. It also issued about $211,057,600 in exchange for about $118,124.200 of Great Northern stock.

*Then, or incidental therewith, the Northern Securities issued and sold for cash—with which to purchase other properties—and for corporate purposes acquired* $7,522,000 *distinct of any property or issues arising from the stocks of the railroads heretofore named.*

See record in main litigation, particularly paragraph six.

It is therefore clearly apparent that 75,000 shares of the Northern Securities stock were issued for cash or other properties received for legitimate corporate purposes.

DISTRIBUTION PROPOSED INEQUITABLE STOCKHOLDERS.

The plan of distribution proposed is illegal, improper, unjust and inequitable in this: that to reduce the capital stock to 39,540 shares, or one per cent of the capital, would be to compel the surrender for Northern Pacific and Great Northern stocks of 35,460 shares (Northern Securities Company) of an aggregate par value of $3,456,0000—more than one-half of the whole and all of the legitimate assets, to-wit: the $7,500,000, of the stock legitimately issued—exclusive of the Northern Pacific and Great Northern stocks acquired.

The plan is inequitable and unjust, because it would force the holders of legitimate stock of the Northern Securities issued legitimately to take the railroad stocks unlawfully held by the Northern Securities, and which the Northern Securities could not lawfully endorse over or convey, nor to which could it give title. It forces the stockholders of the Northern Securities to take stocks of other companies, which they may not desire, and which, as in the present case, some decline to accept, and which, if accepted, would still be subject to an action by the railroads issuing the said stock at the first instance, *upon the ground that the receivers of the same through the Northern Securities distribu-*

*tion could hold no legal title to that which was in the first place illegally conceived and unlawfully possessed.*

Again, it would give to the stockholders of the Northern Securities Company, who received their stock wholly and exclusively in exchange for Northern Pacific or Great Northern stock, a ninety-nine per cent interest in legitimate assets, to-wit: the $7,500,000, in which they have no rightful interest and in which these latter should not participate, but which, in equity, must exclusively belong to the original holders of that $7,500,000, or their assignees or transferees.

The plan is inequitable and unjust to the further extent in that it proposes that $391,446,000 of stock shall be surrendered in exchange for Northern Pacific and Great Northern. This, it is evident, *is* $3,565,500 *more than was originally issued by the Northern Securities in exchange for Northern Pacific and Great Northern stock.* The Northern Securities thus charging a profit upon its illegal transaction and compensation for this original illegal exchange of $3,565,500.

### The Conclusions from Premises Conceded.

These arguments herein made are gathered from the bill of complaint and from the answer of the respondents admitting the facts and figures.

It is impossible that this method should prevail without wringing from the legitimate stockholders that which is theirs, and making them take that which they do not elect to accept, and taking that which is the legal assets of the company and making a "*hotchpotch*" of illegal and legal matter and proportioning the ille-

gal matter to those who should only have legal stock, and giving the legal property to those who can only have legal property in that which was illegally acquired, to-wit: in taking back that which was their own—never the property of the Northern Securities.

### No Estoppel Can Be Urged.

Neither of the main parties to the main contention can urge that, being in possession of the original stocks, they have property in them sufficient to distribute, or that, having the money of the stockholders, put in while the Northern Securities was in possession of the illegally held property, the stockholder is denied the right forsooth that he was a stockholder in an enterprise which, to some extent, was had for wholly illegal purposes—that the stockholder cannot insist upon taking back to himself that which only legally the company would have the right to give as its property and which he as stockholder legally could alone acquire.

2 Pomeroy's Equity, sec. 941.
Story's Equity Jurisprudence, sec. 298.
*O'Connor* v. *Ward,* 60 Mississippi, 1025, 1037.

Nor can the defense of illegality in the enterprise in any wise be urged as against the right of the stockholder who insists upon his proportion only of legal assets held by the company.

*Kinsman* v. *Parkhurst,* 18 How., 289, 293.
*Brooks* v. *Martin,* 2 Wall., 70.
*Planter's Bank* v. *Union Bank,* 16 Wall., 483.
*Block* v. *Darling,* 140 U. S., 234.

ONLY LEGAL ASSETS CAN BE DISTRIBUTED.

It is an undisputed proposition of law that where a corporation is dissolved any distribution of its assets, after paying its debts, must be only with regard to what could be legally transferred by private or public sale and what could have been given title to by private contract.

7 Thomp. on Corps, sec. 8596.

Therefore the intervenor cannot be compelled to accept stock other than that which he actually subscribed for, or what that actually represents, in the legal property of the corporation.

*Railroad Co.* v. *Knoxville,* 98 Tenn., 1; s. c., 37, S. W. Rep., 883.

7 Thomp. on Corps., sec. 8622.

Wherefore, your intervenors move the court that the rights of the stockholders other than those who are parties to the main litigation also be determined, and that a decision be made which shall protect them along the lines of the suggestions herein made.

Respectfully submitted.

JAS. HAMILTON LEWIS,
*Solicitor for Continental Securities Co.*